

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF MELISSA WALKER, by MARK
WALKER, Personal Representative,

UNPUBLISHED
March 27, 2012

Plaintiff-Appellant,

v

No. 302715
Kent Circuit Court
LC No. 10-001504-NH

SPECTRUM HEALTH, APPLEWOOD FAMILY
MEDICINE, and BRENDA ZOOK, M.D.,

Defendant-Appellees,

and

JULIANA J. GREY, M.D.,

Defendant.

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff, the estate of Melissa Walker by Mark Walker, personal representative, appeals as of right the order granting defendants Spectrum Health, Applewood Family Medicine, and Dr. Brenda Zook's motion for summary disposition. We affirm because there is no evidence from which a jury could conclude that Dr. Zook caused Melissa's death.

I. FACTS

Melissa had bariatric surgery in 2000. She saw Dr. Zook in September 2008, complaining of diarrhea. In September, October, November and December 2008, Melissa continued to complain of diarrhea, and also complained of leg swelling and blisters. Dr. Zook noted Melissa had malnutrition and that her protein levels were low. Dr. Zook referred Melissa to Dr. Schram, a bariatric surgeon whose partner had performed Melissa's bariatric surgery. Dr. Schram did not believe Melissa needed a bariatric reversal, but that she needed to increase the amount of protein in her diet. Melissa told Dr. Schram she did not want to have bariatric reversal, but Melissa's sister testified that Melissa had said she would have the reversal if it was a matter of life and death. On December 12, 2008, Melissa saw Dr. Zook and complained that she was "incontinent of stool." Dr. Zook told Melissa that if she got worse, she should go to the

emergency department. Later that day, Melissa went to the emergency department. She was discharged on December 14, 2008. Melissa and her husband, Mark, did not want Melissa to be discharged because her condition was not better. The discharge physician noted that Melissa had an appointment with a GI physician that week and that Melissa should follow up with Dr. Zook in five to seven days. On December 22, 2009, Melissa went to the emergency room in septic shock and died that morning. The cause of death was an e. coli infection.

Plaintiff's expert, Dr. Steven Sauerberg, testified that Dr. Zook breached the applicable standard of care when she did not insist that Melissa have her bariatric surgery reversed and when she did not try to keep Melissa in the hospital on December 14, 2008. The trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) because Dr. Sauerberg's testimony was based on speculation and was not sufficient to establish cause in fact. Plaintiff appealed.

II. ANALYSIS

A trial court's decision to grant or deny a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition pursuant to MCR 2.116(C)(10) is proper "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

MCL 600.2912a(2) provides that in medical malpractice actions, "the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants." To show proximate cause, the plaintiff must establish both legal cause and cause in fact. *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997) (citation omitted). Cause in fact was defined in *Skinner v Square D Co*, 445 Mich 153, 165-166; 516 NW2d 475 (1994) (citation omitted):

The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Plaintiffs may show causation through circumstantial evidence, but "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id.* at 164.

In the instant case, Dr. Sauerberg's opinion that Dr. Zook breached the standard of care is based on speculation and is insufficient to establish cause in fact. *Id.* Regarding the bariatric reversal, Dr. Sauerberg testified that Melissa would have had to agree to it, a surgeon would have had to agree to perform it, and that the ultimate decision of whether to do the reversal rested with Melissa and the surgeon. Dr. Sauerberg admitted he was speculating as to whether the surgery would have been performed even if Dr. Zook had insisted on it. Moreover, if the surgery had been performed, Dr. Sauerberg did not know what the results would have been if Melissa had not changed her eating and drinking habits. Dr. Sauerberg's opinion is based on speculation that the

surgery would have been performed and would have alone prevented Melissa's death. Causation may not be established by speculation. *Skinner*, 445 Mich at 164.

Regarding Melissa's discharge from the hospital, Dr. Sauerberg testified that Dr. Zook breached the standard of care when she did not try to persuade the admitting physician to keep Melissa in the hospital. Dr. Sauerberg did not have an opinion as to whether Dr. Zook could have succeeded in keeping Melissa in the hospital and he could not say whether staying in the hospital would have prevented Melissa's death. As above, Dr. Sauerberg's opinion that Dr. Zook violated the standard of care and more likely than not caused Melissa's death is based on speculation.

Plaintiff has not provided evidence from which a jury could conclude that more likely than not, but for Dr. Zook's conduct, plaintiff's death would not have occurred. *Id.* at 164-165. Thus, there is no genuine issue of material fact and the trial court did not err when it granted summary disposition in favor of defendants. *Latham*, 480 Mich at 111.

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Douglas B. Shapiro